

FEBRUARY 25. 1768



INFORMATION

F O R

ALLAN LOCKHART of *Cleghorn*, Defender,

A G A I N S T

Poor *George Cuthbertson*, Residenter in *Leith*, Pursuer.

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THE Scope of this Process, as pretended by the Pursuer, is the Redemption of a few Acres of Land, lying in the Territory of the Burgh of *Lanerk*; but the reas Intention of it is no other, than to distress the Defender by a vexatious Process; and, in that View, if possible, to squeeze Money from him.

The Facts necessary for understanding the Question are these:

By Disposition, dated the 14th December 1733, now in Process, *Stephen Howison* in *Stonyhill*, upon the Narrative of a certain Sum of Money being paid to him, as the full Worth and Price of the Lands therein mentioned, sold and disposed to *Allan Lockhart of Cleghorn*, now deceased, his Heirs and Assignees, the Lands of *Old Badronald*, lying within the Territory of the Burgh of *Lanerk*, and to be held Burgage.

By Minute, of the same Date with the foresaid Disposition, entered into between the said *Allan Lockhart* and *George Cuthbertson*, Merchant in *Lanerk*, the said *Allan Lockhart* did bind and oblige him, betwixt the Date thereof, and the Term of *Martinmas 1735*, upon the said *George Cuthbertson* and his Heirs their Payment and Performance, in Manner therein and after mentioned, and no otherways, to make, grant, subscribe, and deliver to the said *George Cuthbertson*, his Heirs or Assignees, a valid and sufficient, heritable and irredeemable Disposition of the said Lands of *Badronald*; and the said *Allan Lockhart* did also bind and oblige him, to grant a Discharge and Renunciation to the said *George Cuthbertson*, and his forefaids, of a Debt of 500 Merks Scots of Principal, with Annual-

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rents.

rents and Expences, contained in an heritable Bond granted by the said *George Cuthbertson* and *Elizabeth Inglis*, his Spouse, to the said *Allan Lockhart*, affecting some Houses in *Lanerk*, belonging to the said *George Cuthbertson*, who, on the other Part, by the said Minute, did bind and oblige him, his Heirs, Executors, and Successors, to pay to the said *Allan Lockhart*, his Heirs, Executors, or Assignees, the Sum of 3000 Merks Scots Money, and that betwixt and the said Term of *Martinmas 1735* Years. And the said Minute contains the following Clause: "And it is hereby agreed to betwixt the said Parties, that, if punctual Payment of the said 3000 Merks is not made by the said *George Cuthbertson* and his forefaids, at the said Term of *Martinmas 1735* Years, then this present Agreement shall be *eo ipso* extinct, null and void, to all Intents and Purposes, as if the same had never been made, and both Parties for ever to be free of their mutual Performance, each of them to others."

Soon after entering into this Minute, the said *George Cuthbertson* became bankrupt, and having been inhibited at the Instance of sundry of his Creditors, these Inhibitions were formally intimated to Mr. *Lockhart*.

About this Time also, as would appear, *Cuthbertson* entered into an Agreement with one *John Millar*, by which he assigned to him, for the Considerations therein mentioned, the Right of Reversion, or rather Redemption, of the said Lands of *Badronald*.

At *Martinmas 1735*, Mr. *Lockhart* was charged by *Horning*, to dispone to *John Millar*, Merchant in *Leith*, the said Lands of *Badronald*, in Terms of the Bargain betwixt *Cuthbertson* and *Millar*; but, as *Cuthbertson* had become bankrupt, and had been inhibited; and as some of these Inhibitions had been intimated to Mr. *Lockhart*, he was uncertain, whether he was safe to dispone the forefaid Lands of *Badronald*, or not; and therefore he applied, by Bill of Suspension, to this Court, having previously required *Cuthbertson*, under Form of Instrument, either to warrant him against the Effect of the forefaid Inhibitions, or to get the same discharged.

This Suspension having come before Lord *Cupar*, his Lordship, upon the 10th of *February 1736*, pronounced the following Interlocutor: "Repels the Reasons of Suspension founded upon the Inhibitions against the Charger, in respect of the Answer; and finds, That, upon Payment to the Suspender of the above Sum
" of

" of 3000 Merks, and Annualrent due thereupon, he ought to de-
 " nude of the said Lands of *Badronald*, and renounce the foresaid
 " heritable Bond and Infestment of Annualrent; and finds the
 " Letters orderly proceeded, and deems in these Terms."

Thereafter, at a Calling of the Cause upon the 21st *February* 1736, Mr. *Lockhart*, as Lawyer for the Suspender, resumed the former Minutes and Interlocutor, and contended, That seeing, by the Contract pursued on, the Charger was limited to the Term of *Martinmas* (then) last, for redeeming of the Lands, he ought yet to be limited to a Term for the Redemption found yet competent to him, and the Suspender ought not only to be paid of his principal Sum and Annualrents, but of his Expences.

The Lawyer for the Charger opposed the Answers subjoined to the former Minutes. Upon which Debate the Lord Ordinary pronounced the following Interlocutor: " Adheres to the former Interlocutor, with this Alteration, that the Charger, on or before the Term of *Whitsunday* next, make Payment to the Suspender of the above Sum of 3000 Merks, and Interest that shall be due thereupon at the Time, and of 20 l. Scots of Expences; and, upon his so doing, finds the Suspender ought to denude of the above Lands of *Badronald*, and renounce the foresaid Infestment, and allows the Decree, formerly pronounced, to be extacted in these Terms."

Payment of the Sums, mentioned in the above Interlocutor, was not offered to the said Mr. *Lockhart* at the Term of *Whitsunday* 1736, or at any Time thereafter; and therefore he understood, by the Terms of that Interlocutor, the Lands became his irredeemably.

In that Persuasion, he included these Acres of *Badronald*, in the Entail that he made of his Estate in favour of *Allan Lockhart* his Nephew, the present Defender, and, in every respect, acted *quam dominus*, and full Proprietor of the Subjects. *Cuthbertson* himself possessed them as Tenant for some Years, but at what Rent the Defender does not know. At his Removal, he left the Houses in a ruinous Condition, and they were let to one *Thomas Swinton* Tenant at *Mouse-mill*, in the Neighbourhood, by Way of Let-mailing, the Houses not being habitable, but at what Rent the Defender does not know. *Thomas Swinton's* Circumstances also went wrong. Upon which the Defender's Uncle took them into his own Possession, with a View of improving them, and held them

them till his Death in the Year 1747, during which Time he laid out considerably in planting Trees upon the Banks.

The Defender's Father possessed them for Crop 1747, and, at Martinmas 1747, he, as Administrator-in-law to the Defender, then in Minority, entered into Tack with the present Possessor, *Thomas Martin*, for nineteen Years, at the yearly Rent of 100*l. Scots* for the first five Years, and 200 Merks for the following Years. By this Bargain with the Tenant, the Defender's Father became bound to repair the Houses, and to enlarge them from seven Couples of Timber to thirteen, which was done at *Whitsunday* 1748, and the Expences attending that amounted to 30*l. Sterling*. By the same Agreement, the Defender's Father became bound to procure a Cart-road through the Crofts of *Lanerk*, into the Lands of *Badronald*, which was shut out from the same by interjacent Grounds. In order to implement this Part of his Bargain, he purchased an Acre of Land at the Price of 450 Merks, and he set that Acre to *Martin*, his Tenant, for 10*l. Scots* yearly. This brought the Access so far, but not entirely to the Lands of *Badronald*; and therefore, in order to compleat the Road which he was bound to make, he, with Concurrence of the Defender, the Heir of Tailzie, entered into a Bond of Agreement with *William Howieson* in *Lanerk*, through whose Grounds the Access was to pass, granting him, in consideration of the said Road, the Servitude of watering his Cattle at *Badronald Well*; as also, by a verbal Agreement, gave him off a small detached Piece of the Lands of *Badronald*, during the Tenant's Tack. Again, to compensate the Damage which his Tenant suffered by the Want of this little Bit of Ground, and by *Howieson's* Road to the Well, the Defender's Father agreed to discount the 10*l. Scots* of Rent at which the new-purchased Acre above mentioned was rated; so that, by this Part of the Transaction, the Tenant got the Road which he had conditioned, and the Defender lost annually the Interest of 450 Merks which he had paid for the said Acre.

Further, when the Defender's Uncle purchased the Lands of *Badronald*, and Pertinents thereof, they had the Possession of a Privilege of two Cows Grafs, and Peats and Turf in the Commonmoor of *Lanerk*.—In the Year 1748, the Town disputed that Privilege, and put a Stop to it, which occasioned a Law-suit between the Defender's Father and the Town. This was ended in the Year 1752 or 1753, by a Decision of the Court of Session, finding the Lands of *Badronald* not intitled to a Continuation of these Privileges.—

leges.—By the Loss of this Privilege, he incurred the Warrantice in the Tack to the Tenant, to whom he had set the Lands with the above Privileges in the Moor of *Lanerk*; and, by Decreet-arbitral between him and the Tenant, the Damage was fixed at 2*l.* 11*s.* 8*d.* *Sterling* yearly, to be a Deduction from the Tenant's Rent for Crop 1748, and subsequent Crops, and the Tenant has had that Deduction yearly, down to the Year 1766, when his Tack ended. At that Time the Defender agreed with him for another Tack of nineteen Years, at the yearly Rent of 11*l.* including the Rent of the Acre, valued at 1*l.* 10*s.* but this was only verbal, as the Defender, considering the Dependence of the present Process, did not care to enter into Writing.

The Defender must now inform your Lordships, that, in the Year 1765, this Pursuer, *George Cuthbertson*, who got upon the Poors-roll, raised a Process of Wakening and Transference of the aforesaid Process against the Defender *Allan Lockhart*, now of *Cleg-born*, Nephew and Heir of the said deceased *Allan Lockhart*, as representing his said Uncle; which Summons contained a Conclusion for reducing the foresaid heritable Bond for 500 Merks, and Instrument of Seafine following thereon; and also, containing a Conclusion against the Representatives of *John Millar*, for reducing the foresaid Minute of Agreement entered into betwixt the said *John Millar* and him, making over the said Lands of *Badronald* to *Millar*.

This Cause came before Lord *Kennet* Ordinary, who transferred ^{5 March,}
in statu quo, and afterwards granted Certification *contra non producta*, and made Avisandum.

This Interlocutor, *quoad* the Defender Mr. *Lockhart*, was laid open by a Representation, shewing, that he had never made a Shilling by the Bond of 500 Merks, and the Representation was ordered to be answered; but no Answer ever was given to this Day. The Act was extracted, and Decreet pronounced in common Form *quoad Millar's* Representatives, and the Cause afterwards remitted by the Court to Lord Justice-clerk; and his Lordship, after hearing long Minutes, was, at first pleased to remit the Cause ^{3d February,} ^{1767.} to Lord *Kennet*; but, upon a Representation, and hearing Parties, his Lordship, upon 24th July 1767, was pleased to "recal the ^{3d March,} ^{1767.} "Remit to Lord *Kennet*, and to make Avisandum to the Lords "with the Minutes of Debate, and to ordain Parties Procurators ^{24th July,} ^{1767.} "to

" to make ready their Informations, and lodge them in the Clerks
" Hands, &c."

In obedience to this Appointment, the Defender thought it best, barely to set forth to your Lordships the Circumstances of the Case, without any Argument whatever. They are exceeding short and simple. —— The Defender's Uncle made a Purchase of the Acres in question, from *Stephen Howieson*, the Proprietor, by an Agreement; at the same time, there was given Power to this *Cuthbertson*, the Pursuer, to redeem them within a certain Time, by paying 3000 Merks; and, in case of Redemption, by Payment of that Sum, Mr. *Lockhart* was to discharge an heritable Bond he had of *Cuthbertson's* for 500 Merks. The Meaning of which clearly was, that paying Mr. *Lockhart* the 3000 Merks, was understood to be in full of both, but, if Mr. *Lockhart* kept the Lands, the 500 Merks Bond was to stand. The Fact was, that it was looked upon as a very desperate Debt, which the Issue has proved it to be. It also appears plain, that Parties, that is, the Defender's Uncle, and the Pursuer, considered the Lands not to be worth the 3000 Merks at that Time; and even to this Day the Subject is so bad, that there is nothing of which the Defender would be more desirous than to get rid of it, upon a fair Count and Reckoning; but, being an Heir of Entail, he cannot propose, or even consent to a Compromise of this Kind. If, however, your Lordships shall be of opinion still to put it in this Pursuer's Power to redeem, and to oblige the Defender to give up his Purchase, it is certainly reasonable, and agreeable to Justice, that he should be put in his own Place again, and be allowed a fair Account and Reckoning of the neat Rents he has received, after deducting publick Burdens, together with the above mentioned Deduction, for Want of Privileges in the Moor of *Lanerk*, as also, the Interest of 450 Merks laid out for procuring Ish and Entry to the said Lands, and be relieved of the above mentioned Bond, granted to *William Howieson*, dated July 8th 1752, in regard the Servitude therein contained is absolutely necessary to whoever may be Proprietor of the Lands of *Badronald*, and that he be repaid the above mentioned Sum, and Interest thereof, expended in repairing and building the Houses, as the same was necessary, and laid out *bona fide*; as also, that he be allowed for the Trees planted on the said Lands since 1733, and

and for all Meliorations made upon the saids Lands, and be relieved of the present Tenant's Demands on that account, and of his Promise to continue the said Tenant in the Possession. On the other Side, the Pursuer should be accountable to the Defender for the Sum of 3000 Merks, with Interest thereof from the said Term of *Whitsunday 1736*; as also, for 20*l. Scots* in Lord *Coupar's* Interlocutor, with Interest thereof from *Whitsunday 1736*. The Defender has thus candidly laid the whole Matter before your Lordships, making no Doubt you will pronounce such an Interlocutor as will relieve him, one way or other, from a most groundless and litigious Process.

In respect whereof, &c.

J O. SWINTON junior.

and you will also notice that in all of these, the soil
is dry, which is no doubt caused by the arid climate,
so poor & thin the soil is that it cannot hold water
and it is all cut off at the surface and has to be irrigated.

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